No. 16116

United States

Court of Appeals

for the Ninth Circuit

ROSE WONG and KENT WONG,

Appellants,

vs.

WALTER SWIER and LAURA SWIER,

Appellees.

Opening Brief of Appellants

Appeal from the United States District Court for the
Eastern District of Washington,
Southern Division

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I. PREFATORY STATEMENT

In the District Court Rose Wong, and her husband, Kent Wong, were plaintiffs and Walter Swier and his

wife, Laura Swier, were defendants. The parties will be referred to as they appeared in the trial court or by name.

Rose Wong is the real party plaintiff. Her husband, Kent Wong, was joined as a party plaintiff and in reality is only a nominal party. In this brief when the plaintiffs are referred to, we shall in all instances mean Rose Wong, unless otherwise specified.

The complaint as originally filed by plaintiffs named as defendants, in addition to the Swiers, Dr. James E. Zimmerman, Dr. Leland R. Lugar, and Yakima Valley Memorial Hospital Association. No service of process was obtained upon Dr. Leland R. Lugar. The trial court dismissed the action as to the defendants Dr. James E. Zimmerman and Yakima Valley Memorial Hospital Association and no appeal was or is taken from that order of dismissal. Therefore, the pleadings and portions of the record which pertain to the latter three named defendants are not material in this appeal and will be disregarded insofar as this opening brief is concerned.

II. JURISDICTION

Plaintiff Rose Wong, and her husband Kent Wong, the latter being joined as a party plaintiff subsequent to the filing of the complaint (R. 11), residents and citizens of the State of Idaho (R. 3) filed their complaint in the District Court for the Eastern District of Washington, Southern Division, against the defendants Walter Swier and Laura Swier, residents of the State of Washington (R. 3, 21) claiming damages in an amount in excess of three thousand dollars, exclusive of interest and costs (R. 6), said complaint having been filed on the 29th day of August, 1956 (R. 6).

By pre-trial order (R. 21) among the admitted facts were that the defendants were residents of the State of Washington and that plaintiffs were residents and citizens of the State of Idaho.

Jurisdiction of the United States District Court for the Eastern District of Washington, Southern Division, is invoked by:

28 U.S.C.A.
Sec. 1332
Diversity of citizenship, amount in controversy.

> "(a) The District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of three thousand dollars, exclusive of interest and costs; and is between:
>
> "(1) Citizens of different states; * * * "

The jurisdiction of this court on appeal is invoked by the provisions of:

28 U.S.C.A.
Section 1291

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of district courts of the United States, * * * "

III. STATEMENT OF THE PLEADINGS

Plaintiff Rose Wong, a citizen of the State of Idaho, filed on August 29, 1956 in the United States District Court for the Eastern District of Washington, Southern Division, her complaint in the nature of damages, against the defendants Walter and Laura Swier (R. 3-8). Her husband, Kent Wong, was by order of court (R. 11) added as a party plaintiff.

The complaint alleges jurisdictional facts (R. 3), and proceeds to allege that on October 17, 1955, Rose Wong was employed by the Swiers as an apple picker in the Swiers' orchards in Cowiche, Washington, and that on said date it became the duty of plaintiff in the course of her employment to go upon, and she did go upon, a ladder furnished to her by the Swiers (R. 3); that it

was the duty of the Swiers to furnish her a safe and secure ladder for the performance of her work and that the defendants, on the contrary, carelessly and negligently furnished to plaintiff Rose Wong an unsafe, defective and dangerous ladder, of which fact plaintiff was ignorant (R. 4).

The complaint further alleges that the defendants failed to warn plaintiff of the unsafe, defective and dangerous condition of the ladder and that solely by reason of the dangerous and defective condition thereof, the ladder tipped and fell while plaintiff was upon the same in the performance of her duties on October 17, 1955, that plaintiff was precipitated to the ground, and sustained a left ankle compound comminuted fracture of the distal end of the shaft of the tibia and fibula and was otherwise injured (R. 4); that as a result of the negligence of the defendants plaintiff Rose Wong sustained permanent injuries, a shortening of the left leg; permanent and severe scarring; has been prevented from following any occupation and will continue to be so prevented; has been prevented from caring for her family; has suffered great pain of body and mind; has incurred expenses for medical attention and hospitalization and will continue to incur expenses therefor; has incurred expenses for orthopedic appliances and will continue to incur such expenses, all to her damage in the sum of $100,000.00. The complaint prays judgment against defendants for the sum of $100,000.00 (R. 5-6).

The Answer of defendants Swier admits that Rose Wong was an employee of theirs on October 17, 1955, as an apple picker in their orchard at Cowiche, and that as such employee she used a ladder furnished by the defendants (R. 7); admits that the plaintiff was entitled to be furnished a reasonably safe ladder. Defendants Swier further deny that the ladder furnished by them was defective or unsafe or dangerous, but admit that Rose Wong received an injury, alleging they have no information as to the nature or extent of such injury.

Affirmatively by their answer Swiers allege that the plaintiff Rose Wong's injury was proximately caused by her contributory negligence; and that she assumed the risk of whatever conditions existed in respect of the ladder and the use thereof (R. 9).

On June 10, 1957 (R. 13) Swiers filed their written motion requesting a jury trial (R. 12-13) and sought leave to amend their answer and to file an Answer with respect to Additional Party Plaintiff (R. 13, 15-20).

Plaintiff objected to the granting of the Motion for Jury Trial (R. 20) as not being timely and not being in accordance with the Federal Rules of Civil Procedure, to-wit: Rule 38(b).

The court entered an order striking the defendants' Answer with respect to the additional party plaintiff, and the motion to amend their Answer. While no formal order was entered with respect to granting a trial by jury, the case was tried to a jury.

Pre-trial conference was held on June 6, 1957, and a pre-trial order entered on February 13, 1958 (R. 31). The pre-trial Order contains the following Admitted Facts:

> (R. 21) 1. That the defendants are residents of the State of Washington, and that plaintiffs are residents and citizens of the State of Idaho; and that this court has jurisdiction herein;
>
> (R. 22) 2. That Rose Wong was on October 17, 1955, in the employ of Swiers, and that as such employee she used a ladder furnished by the Swiers, and that the Swiers were under a duty to furnish the plaintiff a safe ladder.
>
> 3. That plaintiff sustained injuries by reason of a fall from said ladder in the course of her employment.

The plaintiffs' contentions as stated in the pre-trial order are that the ladder furnished to her by the Swiers was an unsafe, defective and dangerous (R. 21) ladder, of which fact plaintiff was ignorant and that the defendants Swier failed to warn the plaintiff of the unsafe, defective and dangerous condition of the ladder, which unsafe, defective and dangerous condition of the ladder was known or should have been known by the defendants Swier; that such defective condition included, but was not limited to, the following defects: That the metal plate and bolt assembly at the top of the ladder was defective; that the tongue of the ladder was defective; and any other way in which said two situations could be described (R. 23). Plaintiffs' further contentions as contained in the pre-trial order are that plaintiff's fall was proximately caused by the defective conditions of the ladder and that by reason of the fall, plaintiff sustained a left ankle compound comminuted fracture of the distal end of the shaft of the tibia and fibula, and was otherwise injured; that she has sustained as a proximate result of the negligence of defendants temporary and permanent injuries and disabilities consisting of a shortening of the left leg, permanent and severe scarring, permanent, constant and continual pain (R. 24), has been and will continue to be prevented from following any occupation and from caring for her family, and has suffered and will continue to suffer great pain of body and mind.

Plaintiffs have incurred expenses for medical attention in the sum of $1135.00, expenses for hospitalization $1,841.57; expenses for drugs of $200.00, and for orthopedic appliances in the sum of $50.00; and that the damages proximately resulting from defendants' negligence are special damages of $3,291.57 and general damages of $75,000.00. Plaintiffs further contend that they will continue to incur expenses for medical attention, hospitalization, drugs and orthopedic appliances (R. 25).

The contentions of defendants Swier as contained in the pre-trial order are: That plaintiff Rose Wong assumed whatever risks were entailed in the condition of the ladder or the use made of it or expected of it (R. 25); that plaintiff was negligent in that she endeavored to use the ladder while she herself got in an unbalanced position endeavoring to pick (R. 25) fruit at an angle and distance so as to cause her and the ladder to become unbalanced and to fall; or that she did not set it properly; or in the use of the picking bag she positioned it so that it obstructed a balanced use of the ladder and put her into a unbalanced position with respect to the ladder; or she was not attentive to the fact that she was in an unbalanced position, or was not paying sufficient attention to the fact that in the use of the ladder she could not extend her body to the degree and angle which she must have done, or she permitted herself to slip on the rung of the ladder on which she was standing so that she did not have a firm footing (R. 26).

Swiers further contend that if there were any defective condition or conditions in the ladder amounting to negligence as claimed by plaintiff, that plaintiff Kent Wong became responsible therefor for the reason that when the ladders were furnished to the Wong family, it was requested verbally that he report any defect in their ladders, to which he assented verbally as a part of his employment; and that if such defect arose, then he breached his contract of employment in failing to report any defect (R. 26).

Issues of fact as delineated by the pre-trial order:

1. Was the ladder furnished by defendants Swier so defective and unsafe in the respects set out in the pre-trial order that it was not a safe ladder for the use for which it was intended and furnished, according to the standard of the law of the State of Washington (R. 28-29)?

2. Did plaintiff Rose Wong assume the risk, if any, of said conditions, if any, and the risk of using the ladder in the condition in which it actually was (R. 29)?

3. Was the plaintiff Rose Wong negligent in the use of the ladder in the respects previously alleged in the order (R. 29)?

4. What damage, if any, was occasioned Rose Wong as a proximate result of the negligence, if any, of the defendants, Walter Swier and Laura Swier (R. 29)?

The case was tried to a jury, which jury returned a verdict in favor of the defendants (R. 34) and judgment entered thereon in favor of defendants (R. 35), on March 28, 1958.

Plaintiffs filed on April 4, 1958, their Motion to Set Aside Verdict and Judgment and to Enter Judgment for Plaintiffs, or in the Alternative for a New Trial (R. 36-40), which Motion was denied by the Court (R. 46-47) on May 28, 1958.

It is from the judgment in favor of defendants that plaintiffs bring this appeal.

IV. CONCISE STATEMENT OF CASE

The plaintiff Rose Wong, a woman of 45 years of age (R. 84), married and the mother of five children ranging in age from 7 to 18 years (R. 85), was on October 17, 1955 in the employ of the defendants, Walter Swier and Laura Swier, engaged by them as an apple picker in their orchard near Cowiche, Washington. By occupation she was a missionary and house wife (R. 84) and an ordained minister (R. 130) having been engaged in missionary work for 21 years (R. 84, 113), a number of years being in the foreign field. In the spring of 1955 the plaintiffs were preparing to return to the foreign field of missionary work, under a contract which pro-

vided that they were to receive $350.00 per month (R. 134), plus compensation to some person for the care of the three eldest children (R. 112, 134), who were to remain in the United States. Plaintiff Rose Wong had been acquainted with Walter and Laura Swier for a number of years (R. 55, 307) and this acquaintanceship had arisen and continued by virtue of the religious work in which plaintiff engaged (R. 55, 307). In about June, 1955, the three eldest children of plaintiffs were living with the defendants Swier and under the provisions of the contract the Swiers were to be paid therefor (R. 112, 134). For some reason the contract of the plaintiffs to return to the foreign missionary field was not consummated by the church group with whom they had entered into such contract (R. 133-134) and the plaintiffs went to the Yakima Valley while waiting. They were living in the tenant house on the Swier ranch (R. 129) near Cowiche, Washington, in the summer of 1955; plaintiff Kent Wong doing some work around the fruit farm (R. 111, 135-136) for which he was paid by the Swiers (R. 111, 136).

The apple harvesting season commenced October 10, 1955, on the Swier farm (R. 116); a school vacation was had for the purpose of permitting school children to work in the harvest, and the plaintiffs' three eldest children, together with both of the plaintiffs became employees in such harvest (R. 255).

It is admitted by plaintiffs and also by defendants Swier (R. 21-22) that plaintiff Rose Wong was on October 17, 1955, in the employ of the defendants Walter Swier and Laura Swier, and that as such employee she used a ladder furnished by them, and that the defendants Swier were under a duty to furnish her with a safe ladder. It is further admitted that plaintiff Rose Wong sustained injuries by reason of a fall from said ladder in the course of her employment; that Dr. James B. Zimmerman was contacted with reference to her treat-

ment and care; that she was taken to and admitted to the Yakima Valley Memorial Hospital in Yakima, Washington, and that while there as a patient in said hospital gas gangrene developed.

During the early fall of 1955 plaintiff picked pears for defendant Swier, working about one week (R. 135) during which she used a ladder, handling and setting the ladder herself (R. 114). She had had no experience prior to that time in picking fruit (R. 85). On the morning of October 17, 1955, she was picking Delicious apples using the ladder furnished by the Swiers, and which is plaintiffs' Exhibit 1. She had climbed the ladder after carefully setting and testing it on both sides to see that it was well-balanced, had ascended to the second rung from the top (R. 103), and had picked the apples within reach. She turned her body slightly to the right in order that the bag which was then about full of apples would not hit on the ladder, and as plaintiff turned, there was a quick give of the ladder, and it went out from under her feet. She made a grab for a limb of the tree, but could not hang on, and fell to the ground (R. 123-125) the ladder also falling to the ground (R. 125).

In the fall, plaintiff's left leg struck some object, what is not known (R. 138-139), and she sustained a left ankle compound comminuted fracture of the distal end of the shaft of the tibia and fibula (R. 139, 63). The plaintiff momentarily fainted (R. 140) and upon regaining consciousness saw the bones protruding through her hose (R. 139) and directed the making of a temporary splint (R. 141-142).

Defendant Laura Swier then telephoned the office of Dr. James E. Zimmerman (R. 142, 22), and Dr. Zimmerman sent his office nurse to the orchard scene (R. 143). The nurse administered no temporary aid, having demerol with her and plaintiff advising the nurse that she was allergic to such drug (R. 143). An ambulance

arrived some time later (R. 143) and plaintiff was taken and admitted to the Yakima Valley Memorial Hospital in Yakima, Washington (R. 144, 22) at about one o'clock in the afternoon of the same day, October 17, 1955.

The only evidence offered relative to the accident and how it occurred is the testimony of the plaintiff Rose Wong.

Dr. James E. Zimmerman, physician and surgeon, residing and with offices in Cowiche, Washington (R. 61-62) was called and saw the plaintiff Rose Wong in surgery at the Yakima Valley Memorial Hospital (R. 63). She had suffered a comminuted and compound fracture (that being one that is broken in many places and one that protrudes through the skin) of the lower third of both bones of her left leg, which would be the tibia and fibula; had a laceration, an open wound, in the medial part of the inner part of her left leg where the fragments had pierced the skin and muscle in that area (R. 63). X-rays were taken (R. 64) and show the obvious displacement and alteration of the bones (R. 65). The X-rays taken after reduction, called post-reduction films (R. 68) show the metal plate and three metal screws (R. 68).

Plaintiff remained in the Yakima hospital from the date of admission on October 17, 1955, until December 13, 1955 (R. 22, 88, 100). While confined to the hospital during that period of time gas gangrene set in in the injured left leg (R. 22); she had not been given gas gangrene anti-toxin when the reduction was made on October 17, 1955 (R. 88). One week after her admission to the hospital, to-wit on October 24, 1955, she was again taken to surgery and the cast removed (R. 96) and the gangrene discovered (R. 96-97). Her leg at that time was split open and tubes inserted for drainage, and irrigation of the wound carried out, the plaintiff having been placed in isolation at the hospital (R. 98) and given gas gangrene anti-toxin on October 24th and subsequently thereto (R. 98-99).

During the week from October 17, 1955, the leg became swollen until the cast was very painful and tight (R. 90) and in an attempt to alleviate the pain the cast was split (R. 90). The leg, however, continued to swell (R. 90). Toward the end of that first week the upper part of her leg from the knee to the hip was swollen, blotchy in color with reddish-purple blotches (R. 90). Large green blow-flies continually gathered on the cast (R. 90); her body became covered with an oily and foul smelling perspiration (R. 91), and her back and the back of her neck became very painful (R. 91).

On October 24, 1955, she was prepared for surgery (R. 96) and was taken to the operating room where the doctor pried off the cast with his hands (R. 96) causing such pain that she cried out "this is murder." The doctor squeezed the leg with his hands and blood and pus exploded (R. 96). Plaintiff was then given an anesthetic and put to sleep (R. 97).

After this trip to surgery on October 24, 1955, she was given anti-toxin for gas gangrene (R. 97), and placed in isolation (R. 98).

On November 15, 1955, further surgery was performed on the leg (R. 99), at which time the doctors cut out the rest of the rotting flesh and put a cast from the upper calf and knee of the leg, to the tip of the plaintiff's toes, cutting a window in the cast for drainage and dressing of the wound (R. 100). Plaintiff was discharged from the Yakima Valley Memorial Hospital on December 13, 1955 (R. 88, 100) to her home. She continued to have the injury treated by Dr. Zimmerman, calling at his office at intervals of from every day or two to every four weeks (R. 186-187). In December of 1956, she entered St. Elizabeth's Hospital (R. 100) and further surgery was performed on the leg by Dr. Bocek (R. 100), at which time the old wounds which had continued to drain, were scraped and a long drain put in. The ankle on the left leg which had broken open and was running

green pus, was opened and scraped, a drain put in, and about three stitches taken below the drain (R. 101).

Further surgery was performed in May of 1957, again at St. Elizabeth's Hospital in Yakima, and this surgery also by Dr. Bocek (R. 102). At that time a hole approximately an inch and a half in diameter was scraped in the original wound on the ankle and gauze placed in there as a drain to keep the wound open (R. 102). Dr. Bocek continued to treat the plaintiff and the wound continued to drain until February of 1958 (R. 102) at which time it healed over.

At the time of trial in March 1958, the ankle remains very painful and it is impossible for the plaintiff to walk normally; she uses a cane; the ankle is stiff so that she can neither go up or down stairs except one step at a time and with the support of a railing; the leg is shortened; she is unable to do normal housework or care for her family; by exerting herself the plaintiff can walk a distance of a block (R. 103).

Dr. Max Bocek testified that the plaintiff had two scars, on the ankle, one lateral and one medial; that due to the joint injury because of the fracture, it has resulted in a stiff ankle on the left side, in a slightly toe-down position, and because of the injury to the joint, she shows signs of developing what is called a traumatic arthritis, a breakdown in the joint (R. 158); that previously there had been the condition of osteomyelitis, but at time of trial there were no clinical signs of it (R. 158); that there is a chance of the same recurring (R. 158-159); that in a joint as badly injured as in the instant case, a painful joint remains (R. 162) and will probably need a fusion (R. 162-163) but before surgery of that nature is undertaken a period of 18 months to 2 years should elapse with the wound healed (R. 163) and that the chances of a successful fusion are about sixty per cent (R. 172); and that the chances of a recur-

rence of osteomyelitis, which is a bone infection (R. 171) are about fifty-fifty (R. 170).

The defendants offered no medical testimony with reference to the injury.

Plaintiffs had been earning the sum of $350.00 per month prior to the accident (R. 108, 110, 131) and are now unable to pursue the missionary, religious and church work (R. 132). Rose Wong on October 17, 1955 had attained the age of 45 years and a life expectancy of 25 years and 77 days (R. 370). The plaintiffs had further incurred expenses for hospital bills to the Yakima Valley Memorial Hospital in the sum of $1,492.57 (R. 30) and to Dr. Zimmerman, Dr. Max Bocek, Dr. Brundange and Dr. Noall in the amount of $1135.00; drugs of $360.00 and orthopedic appliances of built up shoes and cane, brace of $55.00 (R. 25, 105-107). No evidence was offered by the defendants with reference to the special damages sustained by plaintiff.

Standing uncontradicted, and therefore admitted, by the defendants are the items of damages sustained by plaintiff resulting from her fall.

The ladder, from which plaintiff fell, was taken into custody by the defendant Walter Swier following the accident and remained in his custody and under his control at all times until the trial (R. 30, 219, 272-273, 348-351, 320, 321). At the pre-trial conference counsel for defendants stated that he had possession of the ladder, that it was available for inspection (R. 30).

Chauncey W. McDonald, a witness for the plaintiffs, employed as a safety inspector for the Department of Labor and Industries of the State of Washington for nine years (R. 69) and prior to that time engaged in construction work since 1922 (R. 70) in connection with which approximately one-fifth to one-sixth of the time involved the use of ladders (R. 70-71) testified that he had examined the ladder, plaintiffs' Exhibit 1, and that

it was not a reasonably safe ladder (R. 73). He demonstrated with the ladder (R. 73) showing that while on the lower rungs of the ladder it was safe, but as one ascended the ladder, the weight shifted to a different portion of the ladder; that the ladder was cracked up along the side-rail where it had been in a twist before and it would not be safe. Further Mr. McDonald testified that due to the looseness in the top yoke (R. 74) the ladder would go into a twist; that the holes where the bolts connect the yoke to the ladder were worn and permitted play (R. 74) and that the ladder was unsafe for use in an orchard for purposes of apple picking because of the looseness (R. 75).

On the contrary, witness on behalf of the defendants Swier testified that the ladder was safe. Mr. Cecil C. Clark, a fruit grower in the Yakima Valley (R. 198) who had used, borrowed and observed many ladders (R. 204) testified that the ladder was loose at the top (R. 211) and that the tongue had some play in it (R. 206) but nevertheless was a safe ladder (R. 206).

However, upon cross-examination, and the witness looking at the ladder, the following testimony was given (R. 222):

> "Q. Is the ladder, Mr. Clark, in its now condition, the same as you have seen it previously?
>
> "A. No, I think those bolts were a little looser when I looked it over at the ladder company.
>
> "Q. Now, you didn't say anything about that this morning, did you?
>
> "A. Well, I was not asked, and I was stopped when I started to make comments, so naturally I wouldn't.
>
> "Q. In other words, you didn't inspect it this morning before your testimony?

"A. Yes, I did. I inspected it before court convened.

"Q. And you were cognizant that they were looser when you saw it previously?

"A. Yes.

"Q. Now, would a three-sixteenths looseness between the side of the yoke and the metallic side of the ladder, would that give more play in the top part of the ladder?

"A. Yes, it would give a little more play.

"Q. And if the hole in the yoke where this small bolt comes through, if the hole in the yoke is larger than the hole in the side piece, would that give more play?

"A. Yes, it's bound to give it a little more play."

He further testified that in the manufacture of ladders the hole in the yoke was the same size as the hole in the side piece of the ladder (R. 223).

Witness C. A. Brazil (for defendants) testified that he had examined the ladder and that there was some looseness in the top assembly (R. 234,); and upon cross-examination testified that customarily in the manufacture of ladders the holes in the yoke and the side plate, where they matched up, were of the same size and that if a small bolt were used in a large hole, it would increase the play (R. 239) and specifically that if a 3/16th bolt were used in a hole in the yoke assembly which was 3/16th inch larger than the bolt, it would give a lot of play (R. 239). Witness Brazil did not testify that the ladder was safe (R. 233-242).

Ben Hovde, witness for the defendants, a fruit rancher, who had owned possibly 20 ladders and borrowed others and had quite a bit of experience in handling ladders (R. 243) testified he had examined the ladder in the case

at Dependable Ladder Company in their warehouse (R. 244), that he observed a play or looseness in the top assembly which he stated was the regular play a ladder would have in average use (R. 245). On cross-examination he testified that by use and wear the hole in the side plate became enlarged (R. 248), but that ladders were not manufactured that way. Witness Ben Hovde did not testify the ladder was safe (R. 243-252).

Herbert Rossow, owner and operator of Dependable Ladder Company since January of 1958 (R. 270) and prior to that time shop foreman of that company (R. 270), which company engages in the manufacture of ladders (R. 271) testified that the ladder which was in evidence as plaintiffs' exhibit 1, had been in their place of business for possibly more than a year (R. 273); that he had checked over the ladder when it was brought in (R. 274) and that more than a year prior Mr. Hudson, Miss Loveland, Mr. Mullins (counsel for plaintiffs) and Mr. Splawn (counsel for defendants) inspected the ladder at the place of business. That at the time of such inspection the play in the tongue of the ladder was measured by Mr. Hudson (R. 274-275) with a ruler which he had borrowed from the witness (R. 275), that the play in the tongue of the ladder was at least four inches (R. 276).

Upon cross-examination Mr. Rossow testified that he recalled Mr. Hudson's measuring the top assembly of the ladder (R. 280), i.e. the gap between the side of the hinge and the side of the plate on the leg of the ladder, measuring the amount of play there was in the bolt compared to the hole (R. 280). He further recalled that Mr. Hudson had commented on the size of the bolt (R. 282) but did not remember the measurable distance (R. 282), but only that it could be measured and was measured by Mr. Hudson. He testified that the ladder in the court room, plaintiff's Exhibit 1, the gap could not be measured at all—it was too small (R. 282).

Witness Rossow did not testify the ladder was safe (R. 270-282).

Louis C. Moritz, fruit farmer in the Yakima Valley for many years (R. 283) having used a lot of ladders both himself and his employees (R. 285) testified on behalf of defendants to the effect that he had examined the ladder in question at the Dependable Ladder Company (R. 286), noticed the steps were tight, that the pole had a little sway back and forth (R. 287), and that he "assumed the ladder would be safe enough for me to put a picker on (R. 288); On cross-examination, he testified that the ladder was loose right at the top (R. 292) and that if there was 3/16th inch play on each side of the hinge, and the same amount in the bolt, that it would make a difference in the stability of the ladder so it would twist more (R. 292).

Defendant Walter Swier testified that he had admitted to the plaintiffs subsequent to the accident of Mrs. Wong, that there was play and looseness in the top of the ladder (p. 265, 266). With reference to the ladder, his statement and testimony were that (R. 270): "It's average or better than average"; and further that he had measured the play in the tongue of the ladder and found it to be four inches one way and three inches the other (R. 292-293).

Defendant Laura Swier testified that she had told plaintiff after the accident that they had found "some looseness in that ladder" (R. 309, 310).

Testimony of the following witnesses on behalf of plaintiff in rebuttal was offered to the effect that the ladder had been tampered with:

The ladder was inspected at the place of business of Dependable Ladder Company on Friday preceding the commencement of the trial on Monday with the following persons present: Mr. Hudson, Miss Loveland, Mr. Mullins (counsel for plaintiffs) Mr. Bounds associated in the practice of law with Mr. Homer Splawn (counsel for de-

fendants), (R. 313, 322, 328, 349). Between the date of inspection and the time the ladder was admitted into evidence during the trial, that it had been tampered with there seems to be no contradictory evidence. Two of defendants' witnesses stated it was not in the same condition when seen during the trial as it was when examined by them previous to trial (R. 280-282, 222). Mr. Hudson and Miss Loveland each testified to the insertion of additional washers in the top assembly of the ladder and the tightening of the bolts (R. 321-327, 312-321), Mr. Mullins testified (p. 329-330) that the thing he noticed which he felt was not the same as it was at the time of inspection was the lateral play of the yoke between the two side plates of the ladder, and the difference between the metal on the hinge at the top and the metal side plates at the top of the ladder; and that there is no play there now.

The ladder was at all times from the date of the accident on October 17, 1955, to and including the date of trial on March 24, 1958, in the possession and under the control of the defendants (R. 30, 219, 272-273, 348-351, 263, 303, 320, 321).

Plaintiffs at the conclusion of all the evidence moved for a directed verdict (R. 352) upon the grounds of a failure of any evidence upon which reasonable people could differ or upon which any other inferences could be drawn other than inferences in favor of the plaintiff. And, upon the further ground, that as a matter of law the defendants had failed to offer any evidence to rebut the presumption which arose in favor of plaintiffs by reason of the tampered-with evidence, i.e., the ladder which was within the possession and control of defendants at all times subsequent to the accident.

The Court denied the motion (R. 357).

The Court's instructions to the jury included instructions on "contributory negligence," "assumption of risk,"

(R. 368) and "unavoidable accident" (R. 369), to which exception was made by the plaintiffs (R. 375-376).

Plaintiffs requested the giving of their tendered Instruction Number 20 (R. 33) with reference to the presumption raised when evidence has been fabricated or altered; and Instruction No. 21 (R. 33-34) with reference to the conduct of a party who destroys, alters or fabricates evidence being an admission.

The Court refused these tendered instructions, and plaintiffs entered their exception (R. 376).

The jury returned its verdict (R. 34) in favor of the defendants. With such verdict, the jury returned the following question: "If we find in favor of the Wongs—were your instructions to the effect—that we were to consider her remaining 25 years and 77 days—for a method of compensation—Yes or No." This was signed by Kenneth B. Elledge, Foreman" (R. 34).

Judgment was entered on the jury verdict (R. 35) in favor of the defendants.

Plaintiffs filed their Motion to Set Aside Verdict and Judgment and to Enter Judgment for Plaintiffs, or in the Alternative for a New Trial (R. 36-38), to which Motion are attached the affidavits of two of the jurors, to-wit: Vincent A. Noga (R. 38-39) and Robert Masterman (R. 39-40). The grounds of the Motion were briefly that the court had erred in denying plaintiffs' Motion for a directed verdict at the conclusion of all the evidence; that the ladder which was the principal exhibit in the case was in the possession and control of the defendants Swiers at all times and that said ladder had been tampered with; that the court had erred in the giving of instructions and the refusal to give plaintiffs' tendered instructions Nos. 19, 20 and 21. Further, that the jury misunderstood the measure of damages as is shown by the question returned together with the verdict (R. 36-37).

The affidavits of the two jurors, attached to said motion, are to the effect that the jury found in their deliberations that the ladder had been tampered with, and that the substance on the bolts connecting the hinge assembly with the top of the ladder was not paint, but was putty, and ascertained this fact both by smelling said substance and by tasting it (R. 38-40).

Submitted upon the hearing of plaintiffs' Motion to Set Aside Verdict or in the Alternative for a New Trial, by counsel for defendants was the affidavit of counsel and the affidavit of two other jurors to the effect that the members of the jury had taken no formal ballot with reference to the tampering (R. 40-44). Submitted also by defendants was a further affidavit of juror Masterman (R. 45) to the effect that "any tampering with the ladder had no bearing on the decision of the jury."

The Court (R. 46-47) included in his statement at the time of entering the order denying plaintiffs' motion to set aside the following language (R. 379): "So that I felt that there was a factual conflict and a factual question to be decided by the jury. It's true that it appeared to me as being a rather one-sided one. If I had been the trier of the facts I would have found that there had been a change in the ladder because I think the evidence was to me very convincing and overwhelmingly so in favor of there having been some tightening of those bolts. How or why I could only conjecture, of course, and I think perhaps it would be fair under these authorities to ask that an inference be drawn against the defendants because of that situation of alteration of the ladder * * *."

Plaintiffs then proceeded to perfect an appeal to this court (R. 47-51).

V. SPECIFICATION OF ERRORS RELIED UPON

1. The trial court erred in denying plaintiffs' Motion for a directed verdict in their favor at the close of all evidence.

2. The trial court erred in refusing plaintiffs' requested Instruction No. 20, as follows (R. 33):

> "You are instructed that a party's falsehood or other fraud in the preparation and presentation of his case, his fabrication, alteration and all similar conduct, is an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the case's lack of truth and merit. That inference does not apply to any one fact in the case, but operates strongly against the whole mass of facts constituting his case.
>
> "You are therefore further instructed that the changes or alterations in the ladder which occurred subsequent to the time of the accident on October 17, 1955, cast suspicion on the whole of the defense of Swiers and create a strong presumption that the ladder on the date of the accident was defective."

3. The trial court erred in refusing to give plaintiffs' requested instruction No. 21 (p. 33-34).

> "You are instructed that all efforts by a party to a suit, directly or indirectly, to destroy, alter, fabricate or suppress evidence is in the nature of an admission by such party that he has no sufficient case unless aided by suppressing evidence, or by the alteration or fabrication of more evidence."

4(a). The trial court erred in giving to the jury the following instruction on contributory negligence, (p. 364-365):

> " 'Contributory negligence' is negligence or want of care, as herein defined, on the part of a person suffering injury or damage which proximately contributes to cause the injury and damage complained of. Contributory negligence bars recovery on the part of a person suffering injury or damage, even though the opposing party is guilty of negligence."

4(b). The trial court erred in giving that portion of the instruction appearing on page 365 of the record, the last clause in the second full paragraph on said page, reading as follows, to-wit:

> "* * * unless you find that recovery by plaintiff is barred by contributory negligence or assumption of risk."

And that portion of the instructions as follows (p. 368):

> "Now, a plaintiff who is contributorily negligent, as such term has been defined to you, cannot recover from the defendants, irrespective of negligence, if any, on the part of the other party, the defendants."

5. The trial court erred in instructing the jury as follows, to-wit (R. 369):

> "One who, as servant or employee, enters into the service of another, assumes by his contract of employment the risk of all dangers ordinarily incident to the work upon which he engages, and also the extraordinary risks of employment if they are open and apparent, although due directly to the master's negligence.
>
> "If you find by a fair preponderance of the evidence and under the Court's instructions that the plaintiff assumed the risk of what befell her, then she cannot recover from the defendants Swier, irrespective of negligence, if any, on their part."

6. The trial court erred in instructing the jury as follows, to-wit (R. 369):

> "Now, every accident does not necessarily establish a cause of action warranting recovery by the injured party. Accidents may occur for which no one is to blame. An unavoidable accident is an unintended occurrence which could not have been prevented by the exercise of reasonable care. There is no liability for unavoidable accidents.

"If this accident should be considered by you to have been unavoidable, then you should return a verdict for the defendants."

7. That the jury misunderstood the measure of damages as shown by the question attached to the verdict and believed that they had to give $100,000.00 or nothing.

VI. SUMMARY OF ARGUMENT

The major portion of the material facts in this case are admitted, thus requiring no proof; i.e., it was admitted that plaintiff Rose Wong was on October 17, 1955, in the employ of the defendants Walter Swier and Laura Swier, and that as such employee she used a ladder furnished by them, and that the defendants Swier were under a duty to furnish a safe ladder. It is further admitted that plaintiff sustained injuries by reason of a fall from said ladder in the course of her employment. Plaintiffs were required, therefore, to prove only two things: (1) that the ladder furnished by the Swiers was defective; and (2) the extent of the injuries and amount of damages sustained by Rose Wong as a result of the fall.

The evidence is uncontradicted insofar as the injuries and damages are concerned. Defendants offered no evidence with reference thereto, thus eliminating that point from our summary here.

There remains, therefore, only the question of the ladder—was it defective? Or, was it a safe ladder?

The ladder in question, from the date of the accident on October 17, 1955, was at all times in the possession, custody and control of the defendants and their counsel. There is no dispute nor contention to the contrary. The ladder was placed in storage at the Dependable Ladder Company by the defendants and their counsel, and was there inspected by witnesses for both parties. At the time the ladder was inspected by plaintiff's witnesses, it was

in the presence of defendants' counsel. The ladder was brought to the court room for the trial of this case by defendants' counsel.

The evidence is that the ladder, as it stood in the court-room, had been tampered with; it was not in the same condition it had been previously when inspected and when the accident occurred.

Defendants offered no testimony to explain such alteration. Upon their failure so to do, plaintiffs contend that a presumption arose that defendants had no defense to plaintiffs' claim except by the alteration of the ladder. Having failed to explain away the tampering with evidence, the presumption remained, and as a matter of law plaintiffs were entitled to a preemptory instruction directing a verdict in their favor.

The court, having over-ruled plaintiffs motion for such directed verdict, most certainly should have instructed the jury with reference to the inference and presumption which arise in the face of evidence which has been tampered with. Such instruction was requested by plaintiffs and refused by the court. That this failure to instruct was error is borne out by the affidavit of a juror, who under oath states that the tampering was not even considered by them. Plaintiffs contend that the failure to instruct the jury with reference to evidence which has been tampered with constitutes reversible error.

There was no eye witness to the accident. No person except the plaintiff Rose Wong testified with reference to the happening thereof and the reason for the ladder falling. Defendants offered no evidence to establish the affirmative defenses contended for by them, i.e., contributory negligence, assumption of risk and unavoidable accident. However, the court instructed the jury with reference to each of said affirmative defenses. Plaintiffs contend that the giving of said instructions without evidence upon which to base the same was error.

That the jury misunderstood the instructions of the court as applicable to the facts they heard is easily ascertained from the question asked by them, and returned with the verdict. The verdict and the question are wholly inconsistent.

The verdict is as follows (R. 34):

> "We, The Jury in the above entitled cause find for the defendants."
>
> Signed: Kenneth B. Elledge,
> Foreman"

Yet the question attached is as follows:

> "If we find in favor of the Wongs—were your instructions to the effect—that we were to consider her remaining 25 years and 77 days—for a method of compensation—Yes or No.
>
> Signed: Kenneth B. Elledge,
> Foreman"

The verdict and the question returned with it are irreconcilable.

VII. ARGUMENT

1. The trial court erred in denying plaintiffs' Motion for a directied verdict in their favor at the close of all evidence.

2. The trial court erred in refusing plaintiffs' requested Instruction No. 20, as follows (p. 33):

> "You are instructed that a party's falsehood or other fraud in the preparation and presentation of his case, his fabrication, alteration and all similar conduct, is an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the case's lack of truth and merit. That inference does

not apply to any one fact in the case but operates strongly against the whole mass of facts constituting his case.

"You are therefore further instructed that the changes or alterations in the ladder which occurred subsequent to the time of the accident on October 17, 1955, cast suspicion on the whole of the defense of the Swiers and create a strong presumption that the ladder on the date of the accident was defective."

3. The trial court erred in refusing to give plaintiffs' requested instruction No. 21 (p. 33-34):

"You are instructed that all efforts by a party to a suit, directly or indirectly, to destroy, alter, fabricate or suppress evidence is in the nature of an admission by such party that he has no sufficient case unless aided by suppressing evidence, or by the alteration or fabrication of more evidence.

The facts and law applicable to specifications of error numbered 1, 2 and 3 are the same and therefore will be presented as one.

It behooves us to keep in mind throughout this argument that a large portion of the material facts are admitted (R. 21-22) i.e., the relationship of employer and employee, the duty of the Swiers to furnish plaintiff Rose Wong with a safe ladder; that in the course of her employment while using the ladder, plaintiff sustained a fall resulting in injury to her. Only two material facts remain to be established by plaintiffs, to-wit: that the ladder was defective; and (2) the extent of injury and amount of damages resulting from the fall.

It is with the first of these that we are concerned at the moment.

Plaintiff's contention is that the ladder was defective in that the hinge or yoke assembly at the top of the ladder was loose, permitting excessive play in the ladder; that

the hole in the metal plate and the side of the ladder were larger than the bolt used to hold them, thereby permitting the additional play in the ladder and the twisting of the ladder in its use, and that it was this condition of the ladder which caused plaintiff's fall and injury (R. 22-23).

Plaintiff's testimony is that the ladder was loose at the top and that she was advised subsequent to the date of the accident of such condition of the ladder by both Mr. and Mrs. Swier (R. 108, 109, 110, 265, 266, 309, 310) these defendants each admitting looseness in the ladder.

That loose condition of the ladder and the play in the assembly was noted by all witnesses examining the ladder after the accident but prior to the date of trial.

The ladder from which plaintiff Rose Wong fell was removed from the orchard where the accident occurred by the defendant Swier and placed in a shed on his place (R. 263, ...). It remained there until it was removed to the warehouse of Dependable Ladder Company at the request of defendants' attorney. It was brought from that place to the court room on the day of trial by counsel for the defendants (R. 348-351). There is no dispute nor contrary contention but that the ladder was at all times from the date of the accident to the trial in the custody and control of the defendants.

When the ladder was examined in the court room during the trial, the testimony of plaintiffs (R. 343-344) and plaintiffs' witnesses was to the effect that the ladder had been altered (R. 329-330, 321-325, 313-315) that washers had been inserted at the top of the ladder between the assembly and the plate, which tightened up the top assembly. Of paramount significance is that defendants' own witnesses also testified that the ladder had been altered and was not in the same condition it was when previously examined by them, such witnesses being Mr. Cecil Clark (R. 222) and Mr. Herbert Rossow (R. 282).

Mr. Clark testified unequivocally that the ladder was not in the same condition (R. 222) using the following language: "The bolts were a little looser when I looked it over at the ladder company." Further testifying that he was cognizant at the time he gave his testimony on direct examination that the bolts were looser when he saw the ladder previously (R. 222).

The trial court itself was convinced that the ladder had been tampered with, as evidenced by its comments (out of the jury's presence) (R. 230) during the trial, and the statements upon denying plaintiffs' motion to set aside verdict and judgment or in the alternative for new trial. We find the court expressing the following (R. 230-231): "It seems to me now, in the present state of the record, that without any question of dispute, it's established that this ladder has been tampered with, that it is not in the condition that it was in the warehouse, * * * and I think at least until you raise a fact or issue to show that this ladder has not been tampered with, you should not demonstrate it. Of course, the thought immediately occurs to me if it is just as good loose, why was it tightened up before it was brought in here? Your own witness says that it was * * * (R. 231). Well, he testifies that it was looser. I don't like the looks of this frankly. I think there has been tampering with evidence before it was brought in."

And, at R. 379: "* * * If I had been the trier of the facts I would have found that there had been a change in the ladder because I think the evidence was to me very convincing and overwhelmingly so in favor of there having been some tightening of those bolts. How or why I could only conjecture, of course, and I think perhaps it would be fair under these authorities to ask that an inference be drawn against the defendants because of that situation of alteration of the ladder, * * *"

After defendants' witness Clark testified to the altered condition of the ladder, their counsel made an offer which

we feel should be brought to the attention of this court, for it strengthens the admission of alteration. At page 231 of the record, we find the following statement by defense counsel: "Well, then, I offer to have him put it in the condition in which it was."

Another witness for the defense, Mr. Herbert Rossow, also testified that the ladder was not in the same condition as it was while stored at his place of business (R. 282).

That the ladder, at all times in the custody and control of defendants, had been tampered with and its condition altered and changed there can be no doubt, and such tampering, and such alteration is evidence that the ladder furnished by Swiers to plaintiff Rose Wong was defective. The law is well established that every presumption is made against a wrong-doer.

McBroom's Legal Maxims
8th Ed. 938

It constitutes a wilful destruction, a wilful spoliation of evidence and gives rise to a presumption unfavorable to the defendants, a presumption regarding which the jury should have received instructions.

Silva v. No. Calif. Power Co.
162 P. 412

The action is one for damages occasioned by the alleged negligence in delivering electricity to plaintiff's tankhouse, which resulted in the destruction of the building by fire.

Trial resulted in a verdict and judgment for the plaintiff.

Defendants appealed, alleging error in instructions.

At the trial the defendants offered in evidence certain wires, which they contended were wires from the fire and leading into the tankhouse. Witnesses testified that these either were not the wires, or in the event they were the

same wires, they had been repaired subsequent to the fire.

With reference to such evidence, the court said:

> "It is laid down as a well settled rule that all efforts by either party to a suit, directly or indirectly, to destroy, fabricate or suppress evidence may be shown, not as a part of the *res gestae* but in the nature of an admission that the party has no sufficient case unless aided by suppressing evidence or by the fabrication of more evidence. Jones on Evidence, Vol. 1, Sec. 22a.
>
> *"The fabrication of evidence is calculated to raise a presumption against the party who has recourse to such practice,* not less than when evidence has been suppressed or withheld."

Wigmore on Evidence
Vol. 12, Third Edition, p. 120, Sec. 278:

> "It has always been understood—the inference, indeed, is one of the simplest in human experience—that a party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not apply itself necessarily to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause.
>
> "* * * The general principle applies in common to all these forms of conduct, it is not necessary, nor is it usually possible, to discriminate the precedents that apply to it in one or another form. Roughly

> classifying them, they admit all forms of personal falsification by the party in the course of the litigation; fabrication or manufacture of evidence, by forgery, bribery, subornation and the like * * * suppression of evidence * * * destruction or spoliation of material objects in general or of documents in particular."

31 C.J.S. Sec. 153—
Evidence

The unexplained and deliberate destruction of relevant documentary or other evidence, or the mutilation of or alteration of such evidence, gives rise to an inference that the matter destroyed or mutilated is unfavorable to the spoliator.

> Sec. 152—The maxim "all things are presumed against a wrong-doer" has been frequently applied to unfavorable inferences or presumptions arising from spoliation of evidence; and in so far as it rests in logic is reinforced by the proposition that men do not as a rule withhold from a tribunal facts beneficial to themselves.

Ernest H. Meyer v. Hammond Lumber Co.
9th CCA
84 F (2) 496.

This case involved the alteration of a log book which was evidence in the case. With reference to the penalty for altered evidence, the court in the case quotes from and relies upon the decision of Judge Benedict in The Tillie, Fed. case No. 14,048, (which is also from the 9th Circuit) as follows:

> "If possible it ought never to happen that a case sought to be supported by a fabricated log book should succeed, * * * if charges of this kind are supported by testimony and remain unanswered in the evidence, they *compel* an adverse decree.

"The legitimate inference in all such cases is that if the true facts were entered in the log book, they would be unfavorable.

Cary-Davis Tug & Barge v. U.S.
(CCA 9)
8 Fed (2) 324

This case also concerned the alteration of a log. In reference to such altered evidence, the court used the following language:

"Once you find it has been tampered with, as I have had occasion to say before in other cases, the court looks with suspicion on the whole matter."

The Silver Palm et al v. U.S.
(CCA 9)
94 Fed (2) 754

This case involved the alteration of logs of a ship's records. Evidence of the alterations by way of erasure was shown. With reference to this issue, the court said:

Page 762: "The importance of the logbook entries in determining marine causes has always been recognized by courts of admiralty. The alteration of log books by erasure and substitution has long been condemned. It not only casts suspicion on the whole case of the vessel, *but creates a strong presumption that the erased matter was adverse to its contention.* (Citing many cases).

"Once you find there has been tampering with a log, as I have had occasion to say before, the court at once looks with suspicion at the whole matter.

Harvey v. U.S.
215 Fed (2) 330

The case involved the charge of traffic in narcotics. The defendant was represented by counsel selected and employed by him. The witness, Patricia Brown, testified

that she had met the defendant and his attorney in the attorney's office, where she was prevailed upon to take heroin and then was handed a typewritten statement and exhorted to memorize it as her testimony at the time of trial.

With reference to such fabricated evidence the court said:

> "Patricia Brown's story of what happened in the attorney's office was clearly admissible, as a fabrication of innocence is cogent evidence of guilt."
>
> Citing: Wilson v. U.S., 162 U.S. 613, 621, 16 S. Ct. 895, 40 L ed. 1090.

The court then continues to add that such conduct "taints the defense *ab initio*" and is a heinous offence, one which undermines the foundations of our whole system of seeking justice through trial.

Sheehan v. Goriansky
56 N.E. (2) 883

Which case holds that spoliation of evidence, tampering, or alteration is in the nature of an admission from which liability could be inferred.

Equitable Life Ins. Co. v. McDonald
(CCA 9)
96 Fed (2) 437

This case relies upon the rule laid down in The Oline Rodriquez, 19 S. Ct. 851, to the effect that spoliation or concealment is a serious offense and authorizes a presumption against the wrong-doer, which presumption remains until it is overthrown by evidence.

It was prejudicial error for the trial court to refuse to instruct the jury with reference to the effect of tampered evidence. The defendants by such evidence admit they had no defense unless they altered the ladder. Having altered the ladder, they destroyed the physical

evidence upon which plaintiff had to rely, nor can it ever be restored. The thing which must occur to each of us is, if the ladder were safe in its condition at the time of the accident, why was it altered? The defendants thus commit a wrong and then profit by that wrong.

From the alteration of the ladder it must be presumed that the ladder in its condition at the time of the accident would establish the plaintiffs' claim that it was defective, and the defendants by such alteration must be held to admit the truth of plaintiffs' contention. It constitutes an admission that the ladder in its condition prior to alteration would operate against them.

10 R. C. L., p. 885.

1 Wigmore on Evidence, 2nd Ed. Sec 291.

McCleery v. McCleery
200 Ala. 4, 75 So. 316

Huber v. Boyle
98 Colo. 360
56 P (2) 1333

When the tampering or alteration was shown, immediately a presumption arose in plaintiffs' favor, a presumption that the defendants Swier had no defense to the case except by the fabrication of evidence, a presumption which is not conclusive, but which rather shifts to them the burden of going forward, the burden of explaining the alteration of the ladder.

Equitable Life Ins. Co. v. McDonald
CCA 9
96 Fed (2) 437

In Anning v. Rothschild & Co.
130 Wash. 232, 235, 226 P. 1013, 1014

In Scarpelli v. Washington Power Co.
63 Wash. 18, 114 P. 870

Nicholson v. Neary
77 Wash. 294, 137 P 492

The burden of going forward shifted to the Swiers, to explain the alteration and upon their failure so to do, the presumption remained. No attempt was made by defendants to rebut the presumption, and plaintiffs were as a matter of law entitled to an instruction with reference to such tampered evidence.

Without exception insofar as we are able to ascertain, spoliation, tampering and alteration of evidence raises an inference and even a presumption that the person is without a claim or defense except by so doing, and the burden is upon him to explain.

Broughton & Wiggins Nav. Co. v. Hammond Lumber Co.
CCA 9
84 Fed (2) 496

The Eturia
CCA 2
147 F 216, 217

We are not unmindful in the presentation of our argument with reference to spoliation or tampered evidence of the established rule that the jury and not the appellate court determines the facts of a case, and that the appellate court will not invade the province of the jury in this respect. The rule, however, is subject to a qualification present in the case before the court, and that qualification is that in the event there has been error of law committed by the trial court which is prejudicial to appellant, the appellate court will then act. Error of law prejudicial to appellants was the failure of the trial court to instruct the jury with reference to tampered or altered evidence.

Defendants did not go forward nor attempt to rebut the presumption. They offered nothing to explain the changed condition of the ladder.

That it is the duty of the court to instruct a jury with regard to the principles of law to be applied to the facts, as determined by them, we feel would need no authority to support it here. The trial court refused, upon plaintiffs' request, to instruct the jury with reference to the presumption raised by altered or tampered evidence, such refusal of plaintiffs requested instructions Nos. 20 and 21, being prejudicial and reversible error.

4. The trial court erred in giving to the jury an instruction with reference to contributory negligence (R. 364-365).

5. The trial court erred in giving to the jury an instruction with reference to assumption of risk (R. 369).

6. The trial court erred in giving to the jury an instruction with reference to unavoidable accident (R. 369).

The instructions in each instance are set forth in *haec verba* at the pages of the record indicated. We do not set them forth in full here for the reason that we do not contend that the instructions are not a correct statement of the legal principles, but rather it is appellants' contention that no instruction should have been given to the jury relating to the three affirmative defenses, i.e., contributory negligence, assumption of risk and unavoidable accident.

Two of these defenses were pleaded affirmatively by the Swiers (R. 9) and all three were among the contentions of the defendants as contained in the pre-trial order (R. 25-26).

There was no eye witness to the fall (R. 260, 121-122), and the only evidence concerning it was the testimony of the plaintiff Rose Wong to the effect that she remembered placing her ladder the morning of the accident (R. 120) and that it was placed solidly with the tongue centered (R. 120) and also tested the ladder by putting weight on it (R. 121), the ground being comparatively

level (R. 121). That at the time she fell, she was on the second rung from the top, (not including the top platform); that she had been picking apples to her left but was not picking or reaching at the time of the fall (R. 122); that she had taken no step but was preparing to descend the ladder (R. 122), and in so doing she turned her body slightly to the right to bring the picking bag from the step so it would not hit and bruise the fruit (R. 123); she was neither leaning nor stretching (R. 123). She further testified that her body was not unbalanced nor was she in any way jerking, shaking or exerting any force on the ladder (R. 123). That both of her feet were on the same rung of the ladder (R. 124) and that simultaneous with her slight movement to the right to bring the apple bag away from the step, she felt the ladder twist and give way and it went from under her (R. 124); that she grabbed for a limb, but that she and the ladder fell to the ground (R. 125) the ladder falling to her left. That is the total evidence offered concerning the occurrence of the fall. No other person gave any testimony of any kind concerning it.

Even though the instructions with reference to contributory negligence, assumption of risk and unavoidable accident may be in proper form, there is no support for them, nor any one of them, in the evidence. The instructions were applicable to the issues as framed by the pretrial order, but that is not sufficient. They must also be applicable to the evidence and find support therein. The giving of these instructions assumed facts which were not established by the defense—facts with reference to which there is no evidence of any kind.

Instructions must be confined to issues as made by pleadings and by proof, and appellants were entitled to instructions so based. To give instructions unsupported by evidence is reversible error.

Cantrill v. Am. Mail Line
257 P (2) 179; 42 Wash. (2) 590

Elm v. McKee
283 O (2) 827; 139 C.A. (2) 353

Leavitt v. DeYoung
263 P (2) 592; 43 Wash. (2) 701

Rathke v. Roberts
207 P (2) 716; 33 Wash. (2) 858

Gould v. Witter
117 P (2) 210; 10 Wash. (2) 553

Leer v. Cohen
116 P (2) 535; 10 Wash. (2) 239

Scandalis v. Jenny
22 P (2) 545; 132 CA 307

Kellerher v. Porter
189 P (2) 223; 29 Wash. (2) 650

To cite further authority for that contention, would we feel be merely cumulative. It is the duty of the trial court in submitting a case to the jury to confine its instruction to issues raised by pleadings and proof, and the submission to the jury of issues raised by pleadings but unsupported by any proof constitutes prejudicial and reversible error.

7. That the jury did not understand the instructions of the court with reference to the measure of damages is conclusively shown by the question returned with the verdict (R. 34), when inquiry is made by the jury as to whether, if they found in favor of plaintiffs, they were to consider the life expectancy of plaintiff Rose Wong in computing those damages.

The question and the verdict are in irreconcilable conflict. In one breath the jury finds for the defendants and in the same breath inquires relative to the method of computing damages for the plaintiff.

VIII. CONCLUSION

We respectfully urge that the verdict of the jury and the judgment entered thereon must be reversed for error of the trial court in the trial of the case and the submission of the issues to the jury. The jury was not instructed with reference to evidence which had been tampered with or altered and gave no consideration to such fact. The jury received no instruction on a point of law involved in the determination of the issues, i.e., tampered evidence, and were instructed on principles of law which had no basis in evidence.

The verdict and question returned by the jury represent an inconsistent determination, upon which no judgment for the defendants might be entered.

To permit a judgment supported by evidence which was tampered with and altered is to reward the spoliator for his wrong. The judgment must be reversed and a judgment entered in favor of the plaintiffs for the amount prayed for in their complaint.

Respectfully submitted,

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